

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMY FULKERSON,)
)
Plaintiff,) Civ. No. 00-6154-AA
)
v.)
)
AMERITITLE, INC., an Oregon) OPINION AND ORDER
Corporation; and)
LINDA K. STELLE)
)
Defendants.)
_____)

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AIKEN, Judge:

Amy Fulkerson brought this action against AmeriTitle, Inc. (AmeriTitle) and its President, Linda K. Stelle, alleging pregnancy discrimination and hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and Or. Rev. Stat. § 659.030, and common law claims for intentional infliction of

1 emotional distress and negligence. Defendants move for summary judgment
2 against all claims. The motion is granted.

3 I. BACKGROUND

4 AmeriTitle is a multi-state corporation that provides title and
5 escrow closing services. On July 13, 1998, AmeriTitle hired Fulkerson
6 as an escrow assistant to work in its downtown Bend, Oregon office.

7 In December of 1998, Fulkerson received favorable ratings in her
8 first performance review and earned a raise of \$80 per month. Fulkerson
9 felt "discouraged" by the amount of her raise. Kitchel Aff., Ex.1,
10 p.37:21 (Fulkerson Depo.)

11 In January of 1999, AmeriTitle financed Fulkerson's advanced
12 training at "escrow school," which she completed successfully.
13 Afterward, Fulkerson was assigned to train three new assistants.

14 From the spring of 1999 until her termination in December 1999,
15 Fulkerson was the subject of documented co-worker and customer
16 complaints. In April of 1999, a mortgage lender phoned AmeriTitle to
17 complain that Fulkerson had been rude and abrupt in demanding that "a
18 check be cut immediately." Kitchel Aff., Ex.8, p.9 (Schafler Depo.).
19 Fulkerson acknowledges that the interaction took place, but denies
20 having been rude.

21 In May of 1999, Cindy Schafler, AmeriTitle's general manager,
22 convened a meeting to mediate a personality conflict between Fulkerson
23 and co-worker Connie O'Neil. At Schafler's request, Libby Hervey, an
24 escrow officer, and Linda Sinclair, Fulkerson's immediate supervisor,
25 attended to help facilitate the meeting.

26 In June of 1999, Ann Easton, a manager in the title department,
27 sent a written complaint to Fulkerson's supervisor. According to
Easton, on a day when the title department was short staffed, Fulkerson

1 angrily demanded that the department supply her with a report that she
2 had requested some time before. Fulkerson "yelled" at Easton, who was
3 "unsettled" by Fulkerson's conduct. Kitchell Aff., Ex. 8, p.12
4 (Schafler Depo.)

5 However, during the same month, a customer sent a letter to
6 Schafler complimenting Fulkerson on the "great job that she does on
7 representing AmeriTitle." Fulkerson Aff., Ex. E. The customer felt
8 "confident" in Fulkerson's abilities to serve borrowers affiliated with
9 her company. The letter was not included in Fulkerson's personnel file.

10 In July of 1999, Phyllis Darnall, another employee in the title
11 department, complained to Schafler that Fulkerson was rude and
12 uncooperative in response to her requests for help with office tasks.

13 In July 1999, Fulkerson received another performance review from
14 Sinclair. Sinclair asked Schafler to be present at Fulkerson's review
15 to help discuss Fulkerson's need for improvement in the areas of
16 patience, interpersonal skills, and teamwork. Despite increased
17 complaints from coworkers and customers, Fulkerson's performance scores
18 increased relative to her last review in December of 1998, and she
19 earned a pay raise of \$100 per month.

20 Fulkerson met with Sinclair in late August of 1999 to inform
21 Sinclair of her pregnancy. According to Fulkerson, Sinclair's attitude
22 and conduct toward her changed immediately. On two occasions, Sinclair
23 confronted Fulkerson on the suspicion that Fulkerson had claimed
24 undeserved over-time on her time cards. After the second confrontation,
25 Fulkerson referred to Sinclair as a "fucking bitch"¹ to a co-worker.

26 ¹In a response to defendant's concise statement of facts, filed with
27 the court after the deadline, Fulkerson denies making this comment.
However, of the ten citations to the record offered in support of

1 Later, Fulkerson's pregnancy was announced at a regular morning
2 staff meeting. AmeriTitle's president, Linda Stelle, was seated next to
3 Fulkerson and said to the group, "We're going to have more babies than
4 dogs around here if we're not careful." Kitchell Aff., Ex. 1, p.11:10-
5 24 (Fulkerson Depo.).

6 In November of 1999, a customer phoned Sinclair to report "blunt"
7 and dismissive conduct by Fulkerson. The customer reported that
8 Fulkerson did not handle her request for a document with the proper
9 courtesy.

10 On December 2, 1999, Fulkerson told Sinclair that she needed to
11 leave work to treat a migraine headache at home. Instead, Fulkerson
12 departed for a vacation in Las Vegas with her husband. Fulkerson called
13 Sinclair the next day from her hotel room in Las Vegas and left word
14 that she was too sick to report to work. Fulkerson told at least three
15 co-workers about her trip either before her termination.

16 On December 9, co-worker Glenda Cruz heard about Fulkerson's trip
17 to Las Vegas. That evening, Cruz informed Stelle of Fulkerson's
18 unauthorized vacation. Cruz also told Stelle that Fulkerson had
19 referred to Sinclair as a "fucking bitch." Stelle then called Schafler
20 and Sinclair and told them to fire Fulkerson the next day. On December
21 10, 1999, Sinclair and Schafler terminated Fulkerson's employment.

22 **II. SUMMARY JUDGMENT STANDARDS**

23 Summary judgment is appropriate "if the pleadings, answers to
24 interrogatories, and admissions on file, together with the affidavits,
25 if any, show that there is no genuine issue of material fact and that
26 the moving party is entitled to a judgment as a matter of law." Fed. R.

27 _____
Fulkerson's denial, one is not in the record and nine make no reference to
the comment whatsoever.

1 Civ. P. 56(c). Substantive law on an issue determines the materiality
of a fact. T.W. Electrical Service, Inc. v. Pacific Electrical
2 Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987).

3 For purposes of summary judgment, the moving party has the burden
4 of establishing the absence of a genuine issue of material fact.
5 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the party moving
6 for summary judgment meets its initial burden, the burden shifts to the
7 non-moving party to show by the production of probative evidence that
8 there are genuine issues of material fact for trial. In re Agricultural
9 Research and Technology Group, 916 F.2d 528, 533 (9th Cir. 1990).

10 In satisfying its burden, the non-moving party may not rely on the
11 mere allegations or denials of that party's pleadings. Fed. R. Civ. P.
12 56(e). Instead, it must set forth specific facts admissible in evidence
13 creating a genuine issue for trial. Lew v. Kona Hospital, 754 F.2d
14 1420, 1423 (9th Cir. 1985).

15 Courts adhere to special rules in evaluating summary judgment
16 motions: (1) all reasonable doubts as to the existence of a genuine
17 issue of fact are resolved in favor of the nonmoving party (2) all
18 inferences to be drawn from the underlying facts are to be drawn in
19 favor of the nonmoving party. T.W. Electrical, 809 F.2d at 630. In an
20 employment discrimination case, if a rational trier of fact could find
21 from the evidence that the employer acted for impermissible,
22 discriminatory reasons, summary judgment is inappropriate. Wallis v.
23 J.R. Simplot, 26 F.3d 885, 889 (9th Cir. 1994).

24 **III. DISCUSSION**

25 **A. Pregnancy Discrimination**

26 Plaintiff alleges that she was terminated due to her pregnancy.
27 Title VII of the Civil Rights Act of 1964 prohibits discrimination on

1 the basis of sex with respect to the terms, privileges, compensation or
2 conditions of employment. 42 U.S.C. § 2000e-2(a)(1). Under the
3 Pregnancy Discrimination Act of 1978 (PDA), discrimination on the basis
4 of pregnancy is a form of sex discrimination actionable under Title VII.
5 42 U.S.C. § 2000e(k).

6 A pregnancy discrimination claim is evaluated under the Title VII
7 burden-shifting analysis set forth in McDonnell Douglas Corporation v.
8 Green, 411 U.S. 792 (1973). A plaintiff alleging discrimination under
9 Title VII may proceed under one of two theories. Sischo-Nownejad v.
10 Merced Community College Dist., 934 F.2d 1104, 1109 (9th Cir. 1991).
11 Under a theory of disparate impact, a plaintiff must prove that a
12 facially neutral employment criterion has a disproportionate effect on
13 employees within a protected class. Id. Under a disparate treatment
14 theory, a plaintiff must prove intentional discrimination on the basis
15 of race, religion, national origin, sex, or in this case, pregnancy.
16 Id.

17 Here, Fulkerson relies on a disparate treatment theory. To
18 establish a prima facie case, Fulkerson must show that: (1) she is a
19 member of a protected class; (2) she was performing her job in a
20 satisfactory manner; (3) she was discharged; and (4) she was treated
21 differently from other persons outside of her protected class.
22 McDonnell Douglas, 411 U.S. at 802. Furthermore, "proof of
23 discriminatory motive" by AmeriTitle is "critical" to her claim.
24 International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15
25 (1977).

26 If Fulkerson successfully establishes a prima facie case of
27 pregnancy discrimination, the burden then shifts to AmeriTitle to
furnish a legitimate, nondiscriminatory reason for her discharge.

1 Sischo-Nowejad, 934 F.2d at 1109. If AmeriTitle comes forward with such
evidence, Fulkerson may rebut AmeriTitle's articulated reason with
2 direct or circumstantial evidence of pretext and an underlying motive of
discrimination. Lowe v. City of Monrovia, 775 F.2d 998, 1005 (9th Cir.
3 1985). Circumstantial evidence of discrimination must be "specific and
4 substantial." Goodwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th
5 Cir. 1998).

6 Fulkerson became pregnant while employed at AmeriTitle and was a
7 member of a protected class for purposes of the PDA and Title VII.
8 Additionally, her discharge from AmeriTitle on December 10 is well
9 documented and is not in dispute. Thus, Fulkerson must prove the
10 remaining elements of satisfactory work performance and differential
11 treatment in order to establish a prima facie showing of pregnancy
12 discrimination.

13 Defendants contend that Fulkerson's deception and use of sick leave
14 to take an unauthorized vacation render her work performance
15 unsatisfactory. They maintain that Fulkerson's negative attitude and
16 poor interpersonal skills posed problems for her co-workers and
17 supervisors even before the announcement of her pregnancy and her
18 unscheduled departure for Las Vegas.

19 Plaintiff relies on the persuasive authority of MacDonald v. Eastern
20 Wyoming Mental Health, 941 F.2d 1115 (10th Cir. 1991) and Leisek v.
21 Brightwood Corp., 2000 WL 900492 (D. Or. 2000), to argue that AmeriTitle
22 cannot use evidence of its legitimate, nondiscriminatory reason for
23 Fulkerson's discharge to attack Fulkerson's prima facie case. I do not
24 find the precedent cited by plaintiff to be controlling.

25 In Leisek, the Court conducted a fact specific inquiry to determine
26 whether a National Guardsman had official orders to report for active
27

1 duty when he missed scheduled work days at his place of employment.
2 Although the Leisek court offers a brief reiteration of the McDonnell
3 Douglas burden-shifting analysis, it does not discuss the issue of
4 considering the employer's reason for termination at the prima facie
5 stage. Leisek, 2000 WL 900492 at 3-5. Furthermore, in finding that the
6 National Guard had not ordered plaintiff to extend the duration of his
7 out of state activities, the Leisek court concluded that an employee
8 with unauthorized absences from work failed to make a prima facie
9 showing of discrimination, a result inconsistent with plaintiff's
10 argument. Id. at 5.

11 In MacDonald, the Tenth Circuit concluded that defeating plaintiffs'
12 prima facie case with reasons proffered for their discharge "raises
13 serious problems under the McDonnell Douglas burden-shifting analysis,
14 which mandates a full and fair opportunity for a plaintiff to
15 demonstrate pretext." MacDonald, 941 F.2d at 1119. The reasoning in
16 MacDonald has not been adopted by the Ninth Circuit. Moreover, the
17 facts underlying MacDonald limit its relevance to the present case. The
18 plaintiff in MacDonald, a psychologist, reported unethical practices
19 taking place at his employer's mental health clinic. Immediately
20 thereafter, plaintiff was placed on six month's probation for an
21 undisclosed breach of confidentiality and "other negative community
22 feedback." MacDonald, 941 F.2d at 1117. When plaintiff denied his
23 employer's allegations and refused to comply with his probation, he was
24 terminated. Plaintiff's subsequent lawsuit alleged both age
25 discrimination and unlawful discharge in violation of his First
26 Amendment right to speak out against ethical violations at his place of
27 employment. The Tenth Circuit held that the strong inference of
retaliation, coupled with the mixed motives alleged by plaintiff,

1 required the court to make a searching inquiry at the pretext phase of
the McDonnell-Douglas analysis, rather than disposing of the claims at
the prima facie stage.

2 Here, in contrast to the facts in MacDonald, there is no allegation
3 or inference of retaliation, and Fulkerson admits to the substance of
4 AmeriTitle's claim of her unsatisfactory work performance - that she
5 lied to her supervisors and took an unauthorized vacation. Although
6 Fulkerson alleges workplace violations in the form of a hostile work
7 environment, she did so only after her termination. Finally, because
8 attending work on scheduled days is a sine qua non of any employment
9 agreement, it is integral to the overall assessment of satisfactory work
10 performance.

11 Additionally, plaintiff fails to show that she was treated
12 differently from similarly situated persons outside the protected class.
13 Although Fulkerson was "aware" that other employees called in sick to
14 secure vacation or travel days, she fails to offer evidence that others
15 did so with the knowledge of their supervisors. Fulkerson also alleges
16 that AmeriTitle gave a male employee several chances to return to work
17 during an unauthorized absence before his eventual discharge. However,
18 at oral argument, defendants clarified that the male employee's absences
19 arose from a surgery and subsequent recovery period whose length was in
20 dispute. More importantly, the employee did not lie about the reason
21 for his absences before leaving work.

22 Finally, Fulkerson notes that AmeriTitle failed to discipline a
23 non-pregnant employee who accumulated 33 absences due to sickness,
24 funerals, and court appearances over a twenty two month period. While
25 the employee's absences may have been numerous, there is no indication
26 that the employee lied about her whereabouts.

1 Even if Plaintiff's unauthorized vacation and deception are not
2 considered at the prima facie stage, they constitute a legitimate, non-
3 discriminatory reason for her discharge. Fulkerson admits that she took
4 an unauthorized vacation, lied to her employer, and does not deny
5 referring to her supervisor as a "fucking bitch." Therefore, in order
6 to avoid summary judgment at the pretext stage, Fulkerson must provide
7 either direct evidence of a discriminatory motive or circumstantial
8 evidence in the form of specific facts showing that AmeriTitle's
9 articulated reason is not credible. Lindhahl v. Air France, 930 F.2d
10 1434, 1437-38 (9th Cir. 1991).

11 The gravamen of Fulkerson's pretext argument is that when her
12 supervisors fired her, they were unaware of her trip to Las Vegas and
13 were motivated by discriminatory reasons rather than legitimate
14 employment considerations. Fulkerson asserts that a genuine issue of
15 fact exists as to whether Cruz notified Stelle of Fulkerson's
16 misconduct. Therefore, Fulkerson maintains that defendant cannot rely
17 on it as a legitimate reason for her termination.

18 I find plaintiff's speculation that her employers conspired to
19 fabricate a post-hoc justification for her discharge unpersuasive and at
20 odds with substantial evidence that Stelle learned of plaintiff's
21 unauthorized vacation on December 9. Dinner guests visiting Stelle's
22 home on December 9 observed Stelle talking to Cruz on the telephone.
23 See Kitchell Aff., Ex.11, p.2:12-25; Ex.12, p.3:2-18. Telephone records
24 confirm that communication between Cruz and Stelle occurred on the
25 evening of December 9.

26 Nevertheless, plaintiff argues that the phone records show a call
27 originating from Stelle to Cruz, rather than from Cruz to Stelle, as
defendants originally claimed. However, to the extent that any

1 discrepancy in sequence constitutes an issue of fact, it is not a
2 material one. The telephone records confirm that, after talking with
3 Cruz, Stelle placed a call to Schafler on the same evening. Schafler
4 and Sinclair discharged Fulkerson the next day.

5 Plaintiff also asserts that, contrary to Cruz's testimony, Cruz
6 could not have learned of plaintiff's deception from Libby Hervey.
7 While Libby Hervey denies telling Glenda Cruz about plaintiff's
8 unauthorized vacation, Fulkerson did not conceal her trip to Las Vegas.
9 She admits to telling at least three co-workers about it, including
10 Libby Hervey. Kitchell Aff., Ex.1, p.196:10-15 (Fulkerson Depo.); Pltf.
11 Depo. Tr. Ex.A-0, Hervey Depo., 73-74.² Thus, any alleged discrepancy
12 regarding the manner in which Cruz learned of Fulkerson's vacation is
13 not material to the basic fact that Stelle was aware of Fulkerson's
14 deception when she ordered Fulkerson's discharge.

15 Additionally, in a response to plaintiff's request for unemployment
16 benefits, dated Dec. 21, 1999, Stelle cited "lying about being sick and
17 going on vacation to Las Vegas" as one reason for Fulkerson's discharge.
18 Stelle Aff., ¶ 2, Ex. A. Stelle prepared the response eleven days after
19 Fulkerson's termination, well before AmeriTitle was on notice that
20 Fulkerson was asserting a claim against the company.

21 Finally, Fulkerson asserts that her supervisors never mentioned
22 the trip to Las Vegas when they fired her. Fulkerson emphasizes that
23 none of the internal memoranda generated during her final meeting with
24 management references her unauthorized vacation. Instead, Fulkerson's

25 ²In her opposition brief, plaintiff argues strenuously that she
26 complied with AmeriTitle's leave policy by telling Libby Hervey that she
27 would be away from the office from December 2-3. It is perplexing that
28 plaintiff attempts to demonstrate that she sought permission for her
29 vacation while simultaneously arguing that her vacation remained a secret
30 until after her discharge.

1 supervisors cited plaintiff's negative attitude as the reason for her
2 discharge. I do not find these facts sufficient to create a genuine
3 issue of fact as to whether Stelle knew on the evening of December 9
4 that plaintiff lied to her supervisors and took an unauthorized
5 vacation. The memoranda merely recorded the substance of Sinclair and
6 Schafler's conversation with Fulkerson. While the memoranda reflect
7 Sinclair and Schafler's omission of the Last Vegas trip from their
8 conversation with Fulkerson, they do not, in and of themselves, reflect
9 evidence of a discriminatory motive. The timing of Fulkerson's
10 termination, telephone records, undisputed witness testimony, and
11 AmeriTitle's response to Fulkerson's request for unemployment benefits
12 support defendants' assertion that Stelle knew of Fulkerson's
13 unauthorized vacation. I find no genuine issue of material fact exists
14 to dispute Stelle's knowledge of Fulkerson's misconduct as of December
15 9. Aside from speculation, plaintiff presents no evidence to rebut
16 these facts and I find them uncontroverted.³

17 Next, Fulkerson contends that Linda Stelle's comments reveal her
18 intent to discriminate on the basis of pregnancy. Specifically,
19 plaintiff claims that Stelle's comment, "If we're not careful, we're
20 going to have more babies than dogs around here," upset Fulkerson and
21 "shocked" a co-worker. Kitchell Aff., Ex.1, p.14:10-11 (Fulkerson
22 Depo.). Fulkerson claims that a co-worker overheard Stelle ask a
23 recently-married employee whether she was planning to have children.
24 When the employee told Stelle that she could not conceive children
25 because her "tubes were tied," Stelle replied, "That's how you get a

26 ³ Plaintiff moves to bifurcate the issue of whether defendants knew of
27 her Las Vegas vacation prior to her termination. There is no basis for such
a request, and regardless, it is moot.

1 raise around here." Pltf. Depo. Tr. Ex. P-Z, Shopfer Depo., p.22:22-23.⁴

2 While Stelle's comments do not reflect sensitivity to the reality
3 of pregnant employees in the workplace, "stray remarks" unrelated to the
4 adverse employment decision are not probative of discrimination. Price
5 Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality); Harris v.
6 Itzhaki, 183 F.3d 1043, 1055 (9th Cir. 1999). Further, Fulkerson fails
7 to establish when Stelle allegedly made the statement about getting a
8 raise and Stelle's comment about dogs and babies was not made close in
9 time to Fulkerson's termination. Thus, Stelle's remarks do not
10 constitute specific and substantial evidence of pretext.

11 Finally, Fulkerson asserts that AmeriTitle subjected a former
12 employee, Heather Ochoa, to pregnancy discrimination. Specifically,
13 Fulkerson claims that Ochoa was "somewhat hassled" about the way that
14 she dressed during her pregnancy, and that AmeriTitle failed to make a
15 part-time schedule available to Ochoa even though two non-pregnant
16 employees were permitted to work part time. Pltf. Depo. Tr. P-Z,
17 Fulkerson Depo., 289:7-10.

18 The record does not support Fulkerson's allegation that Ochoa
19 suffered pregnancy discrimination at AmeriTitle. In fact, none of
20 Fulkerson's co-workers testified to personal knowledge of any difference
21 in the treatment Ochoa received after her pregnancy. See Pltf. Depo.
22 Tr. Ex. P-Z, Petford Depo., 24:11-13; Shopfer Depo., 21:16-21. Although
23 Ochoa's untimely affidavit describes calling upon the Bureau of Oregon
24 Labor and Industry to intervene in a disagreement with AmeriTitle over
25 the duration of her maternity leave, the matter was resolved and Ochoa

26 ⁴ Defendants move to strike this comment, arguing it is
27 inadmissible hearsay. However, it may be admitted as a statement of
28 declarant's then existing mental state, including motive or design.
29 Fed. R. Evid. 803(3).

1 never filed a complaint.

2 In sum, plaintiff fails to establish a prima facie showing of
3 satisfactory work performance or differential treatment to support her
4 pregnancy discrimination claims under Title VII or Or. Rev. Stat. §
5 659.030. In addition, she fails to offer evidence that defendants'
6 legitimate, non-discriminatory reason for her dismissal was a pretext
7 for pregnancy discrimination.

8 B. Hostile Work Environment

9 Plaintiff also claims that Stelle and her co-workers subjected her
10 to a hostile work environment. It is well established that Title VII's
11 prohibitions against sex discrimination extend to sexual harassment in
12 the form of *quid pro quo* advances or a hostile work environment. See
13 e.g., Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57 (1986);
14 Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir.
15 2001). A hostile work environment exists where harassment is
16 sufficiently severe and pervasive to alter the terms and conditions of
17 the victim's employment and to create an abusive working environment.
18 Kortan v. California Youth Authority, 217 F.3d 1104, 1110 (9th Cir.
19 2000). Harassment in a hostile work environment need not be of an
20 overtly sexual nature, but it must be motivated by the victim's gender.
21 Oncale v. Sundowner Offshore Servs, Inc., 523 U.S. 75, 79 (1998).

22 Here, Fulkerson alleges that her co-workers made offensive comments
23 about her pregnancy and resulting changes to her physique.
24 Specifically, her deposition identifies a cluster of incidents taking
25 place after the announcement of her pregnancy in August of 1999.

26 In September of 1999, escrow officer Vicki Russell told Fulkerson,
27 "Your tits are getting huge." Kitchell Aff., Ex.1, p.10:17 (Fulkerson
Depo.). At a later date, when Fulkerson and Russell heard a baby crying

1 in the office lobby, Russell said, "something to the effect of 'you
better get ready, Amy. You better get used to that because that's what
you are going to be hearing all the time-- a baby screaming in your
2 ear.'" Kitchell Aff., Ex.1, p.12:1-7 (Fulkerson Depo.).

3 During the same interaction with Russell, Cyndi Zollner, an escrow
4 assistant overheard the crying baby and asked Fulkerson if her "tits
5 were leaking yet." Id. at 12:23-24. When Zollner asked Fulkerson if
6 she could feel the baby "moving yet," another coworker, Libby Hervey,
7 remarked, "All she can feel moving are her tits." Id. at 14:4-8. Fred
8 Anderson, a coworker from a neighboring department, referred to
9 Fulkerson as "Preggo" on several occasions. Anderson's name calling
10 persisted after Fulkerson asked him to stop. Finally, Fulkerson cites
11 Stelle's comment: "We're going to have more babies than dogs around here
12 if we're not careful," as evidence of a hostile work environment.

13 Fulkerson argues that, taken together, the exchanges involving the
14 crying baby in the office lobby, and the comments of Stelle and
15 Anderson, create a genuine issue of material fact as to the existence of
16 a hostile work environment. I disagree.

17 To determine whether alleged harassment is "severe and pervasive,"
18 the court examines "all the circumstances, including the frequency of
19 the discriminatory conduct; its severity; whether it is physically
20 threatening or humiliating. . .and whether it interferes with an
21 employee's work performance." Harris v. Forklift Systems, Inc., 510
22 U.S. 17, 23 (1993). "Simple teasing, offhand comments, and isolated
23 incidents" do not rise to the level of severe and pervasive harassment.
24 Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

25 I find that the plaintiff fails to show that her co-workers'
26 conduct was either severe or pervasive. Although Fulkerson asserts that
27

1 she was subjected to a three-month period of harassment, the majority of
2 comments were made during one, isolated conversation involving Hervey,
3 Russel, and Zollner. See Kortan, 217 F.3d at 1110. ("There is no
4 question that [the alleged harasser's] remarks were offensive. The
5 difficulty is that they were mainly made in a flurry on February 3rd.")
6 Some time after the conversation, Fulkerson accepted an apology from
7 Libby Hervey, and plaintiff did not encounter offensive behavior from
8 Hervey, Russel, or Zollner after that conversation. Kitchell Aff.,
9 Ex.1, p.12:16-19 (Fulkerson Depo.); Ex.1, p.49:22-p.50:1.

10 In Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1988),
11 the Ninth Circuit found severe and pervasive harassment where, over a
12 two-year period: the plaintiff's supervisor told her of his sexual
13 fantasies involving both his wife and plaintiff; made frequent comments
14 about plaintiff's "ass"; used the company loudspeaker to announce that
15 if plaintiff needed to change clothes, several of her male coworkers
16 would help; and frequently told plaintiff's co-workers of his desire to
17 "get into her pants." Id. at 1104-07.

18 Similarly, in Nichols v. Azteca Restaurant Enterprises, Inc., 256
19 F.3d 864 (9th Cir. 2000), the Ninth Circuit found a hostile work
20 environment where a male waiter was subjected to a "relentless campaign
21 of assaults" by male co-workers who repeatedly referred to him as "she"
22 and "her," taunted him for carrying his tray "like a woman" and referred
23 to him as a "fucking female whore." The Nichols court noted that the
24 episodes of harassment were "not isolated or stray," and occurred "at
25 least once a week and often several times a day." Id. at 870.

26 The conduct alleged by Fulkerson does not approach the level of
27 severity or pervasiveness of that in Draper and Nichols. The majority
of the harassment alleged by plaintiff occurred during one conversation

1 and ceased after an apology. The only alleged harassment that continued
2 for any length of time was Anderson's name calling. On the whole, I
3 conclude that the conduct did not constitute severe and pervasive
4 harassment under Title VII.

5 Even if a reasonable juror could find the alleged harassment to be
6 severe and pervasive, Fulkerson has not raised sufficient facts to
7 demonstrate that AmeriTitle knew or should have known of the harassment.
8 "Once an employer knows or should have known of [coworker] harassment,
9 a remedial obligation kicks in." Nichols, 256 F.3d at 875, (citing
10 Fuller v. City of Oakland, 43 F.3d 1522, 1528 (9th Cir. 1995)).

11 Fulkerson asserts that she reported the alleged harassment to
12 Libby Hervey, her "immediate supervisor" and Mary Crawford,
13 "AmeriTitle's Accounting Supervisor." Memorandum in Opposition to
14 Summary Judgment at 26. However, Libby Hervey was employed as an escrow
15 officer. Hervey Aff., ¶ 1. Although Fulkerson was assigned to Hervey
16 to work as her assistant, escrow officers do not exercise supervisory
17 authority over their assistants. Schafler Aff., ¶ 7. Furthermore,
18 Fulkerson's complaint identifies Linda Sinclair, not Libby Hervey, as
19 her "direct supervisor." Compl., ¶ 9. Fulkerson never notified
20 Sinclair of the alleged harassment. Likewise, Crawford did not exercise
21 supervisory authority over AmeriTitle employees. Pltf. Depo. Tr. Ex. A-
22 O, Crawford Depo., 4:21-24. Fulkerson's own account of the events
23 establishes that she did not notify a direct supervisor of any
24 mistreatment from coworkers. Fulkerson depo. vol. I, 32: 8-10; 38:4-6.

25 ///

26 Q: And did you ever report any of this to any
27 manager or supervisor?

A: No. I did not.

1 Kitchell Aff., Ex.1, p.14:11-13 (Fulkerson Depo.).

2 While Fulkerson addressed the matter with Hervey, Fulkerson's
3 account of their discussion demonstrates that her objective was not to
4 invoke an internal grievance process.

5 A: I told Libby my feelings about what had
6 happened and about how upsetting it
7 was...because I considered her to be a
8 friend. And she apologized to me.

9 Q: Did she explain to you why she made her
10 comment?

11 A: No. There was no explanation regarding
12 her comment that I can recall.

13 Q: And she apologized. Did you refuse to
14 accept her apology?

15 A: No. I accepted her apology and we hugged.

16 Kitchell Aff., Ex.1, p.47:21-p.48:9 (Fulkerson Depo.).

17 Finally, Fulkerson had been employed by AmeriTitle for over a year
18 before the alleged harassment took place. Although AmeriTitle did have
19 an anti-harassment policy in place, Fulkerson failed to avail herself of
20 its protections. See Burlington Industries v. Ellerth, 524 U.S. 742,
21 765 (1998) (Employer may raise an affirmative defense to harassment if
22 the employer took reasonable care to prevent harassing behavior and
23 plaintiff employee failed to invoke anti-harassment policies implemented
24 by the employer). Consequently, liability for the alleged harassment
25 cannot be imputed to AmeriTitle.

26 C. Intentional Infliction of Emotional Distress

27 Plaintiff also asserts claims of intentional infliction of
emotional distress (IIED) against AmeriTitle and Stelle. Under Oregon
law, a plaintiff alleging IIED must show that: (1) the defendant
intended to cause plaintiff's severe emotional distress; (2) the
defendant's acts were the cause of plaintiff's severe emotional

1 distress; and (3) that the defendant's acts transgressed the bounds of
socially tolerable conduct. Sheets v. Knight, 308 Or 220, 236, 753 P.2d
955, 1000 (1988).

2 The focus of IIED cases is not on the result, but on the purpose
3 and means used to achieve it. Madani v. Kendall Ford, Inc., 312 Or.
4 198, 205 818 P.2d 930, 934 (1991). Thus, termination of an employee by
5 an at-will employer, even when motivated by an improper purpose, does
6 not constitute a transgression from the bounds of socially acceptable
7 conduct. Madani, 312 Or. at 204-205, 818 P.2d at 934.

8 In Madani, the Oregon Supreme Court found that an employee
9 terminated for refusing repeated orders to "pull down his pants" and
10 expose himself did not state a claim for intentional infliction of
11 emotional distress based solely on his termination. Id. at 203-206, 818
12 P.2d at 933-934. Plaintiff acknowledged that had he been retained by
13 his employer, he would not have brought suit. Madani, 312 Or. at n.4,
14 818 P.2d at n.4.

15 Here, Fulkerson alleges that her discharge was one of several acts
16 by AmeriTitle and its staff that caused her severe emotional distress.
17 However, Fulkerson is an at-will employee. No evidence in the record
18 suggests that the means used to effectuate her discharge were socially
19 intolerable. See Kitchell Aff., Ex.5, p.12 (Sinclair Depo.). Thus, the
20 mere act of Fulkerson's firing cannot serve as a basis for her claim of
21 intentional infliction of emotional distress.

22 In addition to her firing, Fulkerson alleges that her coworker's
23 and Linda Stelle's remarks regarding her pregnancy constitute conduct
24 "beyond the bounds of reasonable social tolerance." Comp., ¶ 33. While
25 such comments may have been insensitive and arguably offensive, conduct
26 that is "merely rude, boorish, tyrannical, churlish and mean" does not
27

1 rise to the level of intentional infliction of emotional distress.
2 Patton v. J.C. Penney Co., 301 Or. 117, 124, 719 P.2d 854 (1986).
3 Further, Hervey and Zollner's alleged tortious conduct do not
4 demonstrate an intent to inflict severe emotional harm. After Fulkerson
5 made her feelings known to Hervey, the two women discussed the matter
6 and Hervey apologized. Kitchell Aff., Ex. 1, p.48:1 (Fulkerson Depo.).
7 After the apology, the two women hugged. Id., at 48:8-9. Hervey and
8 Zollner presented Fulkerson with a new maternity outfit at work a week
9 later. Id. at 49. None of the conduct at issue represents the
10 egregious, harmful behavior encompassed by the tort of intentional
11 infliction of emotional distress.

12 D. Negligence

13 Finally, Fulkerson alleges that AmeriTitle was negligent both in
14 retaining employees who made abusive remarks and in failing to take
15 corrective measures to improve a hostile work environment. Compl. ¶ 38.
16 Thus, Fulkerson's negligence claim is premised on the existence of
17 sexual harassment and or tortious conduct in the workplace. Because
18 Fulkerson has failed to create a genuine issue of material fact as to
19 either, her employer cannot be held liable under a theory of negligence.

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IV. CONCLUSION

For the foregoing reasons, AmeriTitle's and defendant Stelle's motions for summary judgment (docs. 45, 42) are GRANTED. Plaintiff's complaint is HEREBY DISMISSED. Plaintiff's Motion to Bifurcate (doc. 69) and defendant's Motion to Strike (doc. 77) are DENIED as moot.

IT IS SO ORDERED.

Dated this 11th day of December, 2001.

/s/ Ann Aiken
Ann Aiken
United States District Judge